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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91222903
Party	Plaintiff Franciscan Vineyards, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Franciscan Vineyards, Inc.

Opposer

v.

Davis Estates, LLC

Applicant

----------X

Opposition No. 91222903

Mark: RAVISHING RAVEN

Serial No.: 86240115

OPPOSER'S MOTION TO STRIKE AFFIRMATIVE DEFENSES IN LIEU OF ANSWER TO COUNTERCLAIM

Opposer, Franciscan Vineyards, Inc. ("FVI") by its attorneys, Baker and Rannells, PA, hereby moves to strike the first, second, third and eighth affirmative defenses of Applicant, Davis Estates, LLC ("Applicant"), as pled in its Answer and Counterclaim.

As will be discussed in greater detail herein, the alleged defenses do not provide Applicant with legally sufficient (or supported) defenses, and are insufficient under TTAB pleading standards. This motion is timely made within the time prescribed in Fed. R. Civ. P. 12(c). Insofar as the motion falls under Fed. R. Civ. P. 12(f), the board has discretion to hear the same at this time. And, to the extent the motion requires the Board to look beyond the pleadings, the motion may be considered a motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(c).

Granting the instant motion would be helpful in narrowing and limiting the issues in this proceeding and thereby also serving as a guide in conducting discovery. As stated in 2A Moore's Federal Practice paragraph 12.21[3]:

> "Although courts are reluctant to grant motions to strike, where a defense is legally insufficient, the motion should be granted in order to save the parties unnecessary expenditure in time and money in preparing for trial."
> See *id.* Opposer's grounds for this motion are set forth below.

Fed. R. Civ. P. 12(f) also provides that a motion to strike must be made before responding to the pleading. As an answer to Applicant's Counter-Claim is not yet due and has not been filed, this motion is timely and is in lieu of filing a response to the counter-claim at this time.

Opposer's First Affirmative Defense Should Be Stricken

A motion to strike the defense of failure to state a claim upon which a relief can granted may be used by a movant to test the sufficiency of a pleading. *See, e.g., Rooibos Limited v. Forever Young (Pty) Limited and Virginia Burke-Watkins*, 2003 TTAB LEXIS 65 at* 11-12 (TTAB 2003). Accordingly, in determining whether to strike an affirmative defense, it will be necessary to look at the sufficiency of the pleading. *See id.*

The First Affirmative Defense should be stricken in its entirety. The affirmative defense is as follows:

FIRST AFFIRMATIVE DEFENSE

> *The Opposition fails to state a claim upon which relief can be granted.*

At the pleading stage, Opposer must allege facts demonstrating its real interest in the proceeding and those facts must thereafter be proven as part of its case. *See, Ritchie v. Simpson*, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). To plead a real interest, a party must allege a "direct and personal stake" in the outcome of the proceeding. *See id.* at 1026. The allegations in support of the Opposer's belief of damage must have a reasonable basis "in fact." *Id.* at 1927 (*citing*

Universal Oil Products. v. Rexall Drug & Chemical Co., 463 F.2d 1122, 174 USPQ 458-459-60 (CCPA 1972) and stating that the belief of damage alleged by plaintiff must be more than a subjective belief).

Applicant's asserted defense questions the sufficiency of Opposer's pleading. While Rule 12(b) permits Applicant to assert the above defense, "it necessarily follows that a plaintiff may utilize this assertion to test the sufficiency of the defense in advance of trial by moving . . . to strike the 'defense' from the defendant's answer." *See Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1222-1223 (TTAB 1995), (citing *S.C. Johnson & Son, Inc. v. GAF Corporation*, 177 USPQ 720 (TTAB 1973)).

The following factors set forth in *Sons of Italy* govern a motion to strike a defense of failure to state a claim upon which relief may be granted:

> 1. To withstand a motion to dismiss for failure to state a claim upon which relief can be granted, an Opposer need only allege such facts as would, if proved, establish that (1) the Opposer has standing to maintain the proceeding, and (2) a valid ground exists for opposing registration.
>
> 2. For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of Opposer's well-pleaded allegations must be accepted as true, and the Notice of Opposition must be construed in the light most favorable to Opposer.
>
> 3. Dismissal for insufficiency is appropriate only if it appears certain that the Opposer is entitled to no relief under any set of facts which could be proved in support of its claim.
>
> 4. The standing question is an initial inquiry directed solely to establishing the personal interest of the plaintiff. An Opposer need only show "a personal interest in the outcome of the case beyond that of the general public." See *id.*

Opposer initiated the proceeding under the allegations it is the owner of the mark at issue. In its Notice of Opposition, Opposer establishes standing, and thus sufficiency to the initiate the proceeding including and not limited to allegations that:

5. Opposer is now and has been, for many years prior to any date which may be claimed by Applicant, engaged in the use of Opposer's Mark for wine.

6. The use by Opposer of the Opposer's Mark for the Opposer's goods alleged herein is long prior to any date which may be lawfully claimed by Applicant, and Opposer has priority.

7. Upon information and belief, Applicant intends to distribute and sell its goods through the same channels of trade as Opposer, and direct its respective goods to the same ultimate consumer as Opposer.

8. The Opposer's Marks and Applicant's RAVISHING RAVEN mark are confusingly similar when applied to the goods of the parties.

9. The goods of Applicant and Opposer are identical, and Applicant's intended use of RAVISHING RAVEN in connection with its goods is without the consent or permission of Opposer.

10. Since Opposer owns the Opposer's Mark by virtue of prior use, mistake or deception as to the source of origin of the goods will arise and will injure and damage the Opposer and its goodwill.

11. The registration of the mark RAVISHING RAVEN to Applicant will cause the relevant purchasing public to erroneously assume and thus be confused, misled, or deceived, that Applicant's goods are made by, licensed by, controlled by, sponsored by, or in some way connected, related or associated with Opposer, all to Opposer's irreparable damage.

12. As a result of long use, widespread advertising and promotion, and successful sales for nearly Thirty years, Opposer's Marks have become distinctive and famous, (being well-known

and highly regarded throughout the United States), long prior to the date Applicant filed its application to registrar Applicant's Mark.

13. The registration of the mark RAVISHING RAVEN to Applicant will cause and/or is likely to cause dilution by the blurring of the distinctive quality of Opposer's Mark, all to Opposers irreparable damage.

14. Opposer believes that it is and will be damaged by registration of the mark applied by Applicant.

The foregoing allegations are specifically set forth in Opposer's pleading and, if proven, Opposer establishes standing and thereby shows its entitlement to relief. That, contrary to Applicant's contentions, there is no genuine issue of material fact as to Opposer's standing in that it has asserted a real commercial interest in opposing Applicant's application Ser. No. 86240115 as well as a valid ground upon which to oppose the same. As a matter of law, Applicant's first defense should be stricken.

Applicant's Second Affirmative Defense Should Be Stricken

The affirmative defense of unclean hands must be sufficiently plead. See also, TBMP §311.02(b) (The elements of a defense should be stated simply, concisely, and directly. [Note 14.] However, the pleading should include enough detail to give the plaintiff fair notice of the basis for the defense. [Note 15.] When one of the special matters listed in Fed. R. Civ. P. 9 (including, inter alia, capacity, fraud, and judgment) is pleaded, the provisions of Fed. R. Civ. P. 9 governing the pleading of that special matter should be followed. [Note 16.]). The Second Affirmative Defense should be stricken in its entirety. The affirmative defense is as follows:

SECOND AFFIRMATIVE DEFENSE

The Opposition is barred by the doctrines of unclean hands.

Not only does Applicant fails to allege sufficient facts, but it fails to allege any facts whatsoever. Furthermore, and notwithstanding the unavailability of the defense, unclean hands must be related to Opposer's claim. *See Tony Lama Company, Inc. v. Anthony Di Stefano*, 206 USPQ 176, 179 (TTAB 1980). *See also Warnaco Inc. v. Adventure Knits, Inc.*, 210 USPQ 307 (TTAB 1981) ("the concept of unclean hands denying relief to a plaintiff is not intended to serve as a punishment for extraneous transgressions"); and *VIP Foods, Inc. v. V.I.P. Food Products*, 200 USPQ 105, 113 (TTAB 1978) ("misconduct in the abstract, unrelated to the claim in which it is asserted as a defense does not constitute unclean hands").

Opposer opposes Applicant's application Ser. No. 86240115 because the Applicant's mark is confusingly similar to and/or likely to dilution distinctive quality of Opposer's Mark. Seeing as Applicant provides no insight as to any allegation that is related to Opposer's actions, and because the defense is unavailable, the defense of unclean hands should facially fail.

Opposer's Third and Eighth Affirmative Defense Should Be Stricken

THIRD AFFIRMATIVE DEFENSE

The Opposition is barred by fraud.

EIGHTH AFFIRMATIVE DEFENSE

Opposer's registrations for RAVENS (Reg. No. 2888963 and 3134833) were obtained fraudulently, as to International Class 33.

It is unclear what Applicant's basis is for the defenses as the Answer does not include any allegation related to unclean hands and or fraud. Nevertheless, the defense with regards to fraud does not meet the minimal requirements of Fed. R. Civ. P. 9(b), whereby there is no expression

of the circumstances constituting fraud. Interstate Brands Corp. v. McKee Foods Corp., 1996 TTAB LEXIS 515 (Trademark Trial & App. Bd. Sept. 25, 1996). Because Applicant does not properly plead "fraud" in its affirmative defenses without, the statements should be stricken.

CONCLUSION

WHEREFORE, Opposer respectfully moves that its motion to strike the first, second, third and eighth affirmative defenses of Applicant's Answer be granted in all respects.

Dated: December 9, 2015

Respectfully submitted for Opposer,

FRANCISCAN VINEYARDS, INC

/Stephen L. Baker/

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the instant Motion to Strike was sent to Applicant on this, the 9th day of December 2015 by serving same unto its counsel by first class mail at the following:

Daniel A Reidy, Esq.
Law Office of Daniel Reidy
1230 Spring St, Ste. B
Saint Helena, CA 94574-2070

/Stephen L. Baker/

Dated: December 9th 2015

Stephen L. Baker